IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976
No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and
VIRGINIA C. MADDEN, his wife,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Appellants' Response to Appellees' Motion to Dismiss or Affirm

GARFIELD R. JEFFERS &
JAMES M. DANIELSON
Counsel for Appellants
DALE M. FOREMAN
on the Brief

Office & Post Office Address:
Jeffers & Danielson
Suite C, Professional Centre
Post Office Box 1688
Wenatchee, Washintgon 98801
(509) 662-2146

IN THE SUPREME COURT
OF
THE UNITED STATES

OCTOBER TERM, 1976
No. 76-67

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON;
HOWARD PREY, LLOYD McLEAN, and
MICHAEL DONEEN, Commissioners
thereof,

Appellants,

vs.

BLAINE M. MADDEN and
VIRGINIA C. MADDEN, his wife,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Appellants' Response to Appellees' Motion to Dismiss or Affirm

GARFIELD R. JEFFERS &
JAMES M. DANIELSON
Counsel for Appellants
DALE M. FOREMAN
on the Brief

Office & Post Office Address:
Jeffers & Danielson
Suite C, Professional Centre
Post Office Box 1688
Wenatchee, Washintgon 98801
(509) 662-2146

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976
No. 76-67

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON; HOWARD PREY, LLOYD McLEAN, and MICHAEL DONEEN, Commissioners thereof,
Appellants,

vs.

BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Appellants' Response to Appellees' Motion to Dismiss or Affirm

Appellant, Public Utility District No. 1 of Douglas County, Washington, pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States, responds to the issues raised in Appellees' Motion to Dismiss or Affirm as follows:

I. In response to Appellees' Paragraph (a), this appeal is within the jurisdiction of the Supreme Court.

(A) The counsel for Appellee complains that he has never been served with a one-page Notice of Appeal. Yet counsel for Appellee did receive a fifty-six page Jurisdictional Statement within the ninety-day time limit for docketing an appeal.

In fact, the Notice of Appeal (a copy of which is affixed hereto as Exhibit A) was served personally on Appellee Blaine M. Madden at his home on May 25, 1976. (Affidavit of Service attached as Exhibit B). This Notice of Appeal was also filed with the Ninth Circuit Court of Appeals and the United States Supreme Court. The Counsel for Appellee does not complain of not receiving actual notice, but asks for dismissal on the basis of an inconsequential, technical flaw.

The Jurisdictional Statement sets forth in great detail the Appellant's case and was actual notice to Appellee's counsel of the pending appeal. To uphold the argument of Appellee that failure to serve counsel with the Notice of Appeal invalidates the appeal, is to acclaim form over substance. While it is true that the Court cannot function without rules, the value of a particular rule must be balanced by the potential injustice if inflexibly enforced. Appellee can show no prejudice or disadvantage resulting from the non-receipt of a Notice of Appeal.

(B) The Court has discussed the issue of procedural irregularities on numerous occasions and has exercised the discretionary power to waive them when actual notice had been timely received by all parties and the substance of the case was presented on its merits. Here the defect was not jurisdictional. See *Johnson v. Florida*, 391 US 596, 20 L Ed 2d 838, 840, 88 S Ct 1713 (1968) citing *Pittsburgh Towing Company v. Mississippi Valley Barge Line Co.*, 385 US 23, 17 L Ed 2d 31, 87 S Ct 195 (1966). The defect was so minor as to be inconsequential and should be waived.

The Supreme Court has allowed a technically defective appeal to be decided on its merits in the recent case of *Johnson v. Florida*, supra. There the Appel-

lant failed to docket an appeal until fifty-six days after the expiration of the sixty-day period provided by the Supreme Court Rule 13(1). The Court passed over the defect, stating in a footnote:

> "The judgment of the Florida Supreme Court from which this appeal is taken was entered October 4, 1967. Appellant's notice of appeal, filed December 30, 1967, was timely under Rule 11(1) of the Rules of this Court. The appeal was not docketed until 56 days after the time provided in Rule 13(1) expired. This defect, however, is not jurisdictional. Pittsburgh Towing Co. v Mississippi Valley Barge Line Co. 385 US 32, 17 L Ed 2d 31, 87 S Ct 195." (20 L Ed 2d 838, 840).

The case cited by the Court, *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., supra*, contains an excellent discussion of the Court's attitude toward procedural rules and foreshadows the flexible approach taken in *Johnson v. Florida*. In *Pittsburgh*, the majority states:

> "The motion to dismiss is granted for failure of appellant to comply with the time requirement of Rule 13(1) of the Rules of this Court in docketing its appeal. This appeal was docketed 22 days after expiration of the 60-day period provided by the Rule. During that period, appellant made no application for an enlargement of time, either to the District Court or to a Justice of this Court (see Rule 13(1)), nor did any explanation accompany the untimely docketing of the appeal. The jurisdictional statement itself is silent on the subject. Not until appellee moved to dismiss pursuant to Rule 14(2) did appellant comment upon its default. Its reply to the Motion to Dismiss states that the 'delay was occasioned by a misunderstanding between Counsel for appellants.' It does not elaborate.
>
> "This Court has been generous in excusing

errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence."

In the *Pittsburgh* case the defect could have been detrimental to the Appellee and the Appellant failed to explain or comment upon the default. Yet even then Mr. Justice Black dissented, saying:

"Due to a misunderstanding among appellant's lawyers this case was not docketed nor was the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13(1), The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14(2) because of this error of appellant's lawyers. Rule 14(2) permits, but does not require, such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court have been injured — as the Court seems to intimate without record support — by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special

category of administrative orders is frustrated. . . . As I have previously stated, 'The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. *Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits.*' Beaufort Concrete Co., supra, 384 US at 1006, 16 L Ed 2d at 1019, Black, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1). (emphasis added).

(C) The failure to serve Appellee's counsel with a one-page Notice of Appeal was more than rectified by timely service of a fifty-six page Jurisdictional Statement. The Supreme Court does have jurisdiction over this litigation and the Appellee's technical argument is without merit.

II. In response to Appellee's Paragraph (b), this Appellant has phrased its appeal according to 28 USC 1254(1) which specifically states:

"By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree,"

The case law clearly sets forth the distinction between an appeal and a writ of certiorari. *City of El Paso v. Simmons*, Tex. 1965, 85 S Ct 577, 379 US 497, 13 L Ed 2d 446, rehearing denied 85 S Ct 879, 380 US 921, 13 L Ed 2d 813.

However, the Supreme Court has on many occasions

determined to treat an appeal improvidently taken as a petition for a writ of certiorari. *City of El Paso v. Simmons, supra; Bradford Electric Light Co., Inc. v. Clapper*, N.H. 1931, 52 S Ct 118, 284 US 221, 76 L Ed 254.

Therefore, although the Appellant has entitled its Jurisdictional Statement, "On Appeal from the United States Court of Appeals, Ninth Circuit," since the Jurisdictional Statute relied upon is 28 USC 1254(1), the Supreme Court may treat the matter as either an appeal or a Petition for a Writ of Certiorari.

III. In response to Appellee's Paragraph (c), this Appellant reasserts that the question presented is indeed substantial and does warrant further argument. The actual question presented by Appellant, as set forth at pages 13 through 14 of the Appellant's Jurisdictional Statement, is, "Does the decision of the Ninth Circuit Court of Appeals allow a state to defeat Federal Condemnation actions in the United States District Court and thereby inpinge on the development of Federal Power Act projects?"

The instant litigation does present a clear example of deprivation of property rights. Yet the question herein presented is not a single isolated occurrence. The viability of Federal Power Act projects will be attacked many times in Washington State and, if other states enact legislation similar to R.C.W. 54.16.220, the long-range affect on power production facilities is clearly to detract from a uniform and coherent federal policy and add to the growth of a multitude of conflicting state regulations.

Energy production is of major importance to our nation. When a state can interfere with a federal energy production program, a major and substantial

question arises. It should be resolved by the highest court of the land.

IV. Appellant requests the Court to examine the conflict apparent in Memorandum Opinion of the Court of Appeals (in Appendix A) and the express language of the Stipulation between the parties in the United States District Court.

> The Court of Appeals erroneously held that: "The federal judgment effectively conveyed to the District all of the Maddens' then title in the subject land, with the exceptions therein expressly stated. But it did not convey the right that the Hallauer Act gave to the Maddens, by operation of state law, . . ."

However, this decision is not supported by logic or evidence. In fact, the United States District Court judgment clearly reveals that the Appellee Madden was to retain only those rights expressly reserved in the Stipulation.

The Stipulation is recorded at pages A-24 through A-27 of the Appellant's Jurisdictional Statement. It contains no mention of Hallauer Act rights. The judgment is recorded at pages A-9 through A-12 of the Appellant's Jurisdictional Statement and at page A-11 it states:

> "Public Utility District No. 1 of Douglas County, State of Washington, shall be and become the owner *in fee simple* of the lands, real estate premises and appurtenances sought to be appropriated herein and as described in the complaint, amendment to the complaint and pretrial order herein, and shall be entitled to enter upon and take possession thereof and to take, hold, own and at all times thereafter use and possess the same *subject only* to the provisions of the above-mentioned stipulation . . ."

Therefore, the Court of Appeals ignores the fact that the United States District Court decreed that all rights not expressly set forth in the Stipulation were merged in the Appellant's fee simple interest. This is the Common Law solution and to hold otherwise is to grant the Appellee a windfall, allowing him to obtain an interest in real property which was paid for by the Appellant.

V. Conclusion

For the reasons stated above, Appellant respectfully submits this Court does have jurisdiction of the issues, that those issues are substantial, that probable jurisdiction of this case should be noted, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

GARFIELD R. JEFFERS &
JAMES M. DANIELSON
Counsel for Appellants
DALE M. FOREMAN
on the Brief

Office & Post Office Address:
Jeffers & Danielson
Suite C, Professional Centre
Post Office Box 1688
Wenatchee, Washintgon 98801
(509) 662-2146

Exhibit A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff-Appellee,* *vs.* BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife, *Defendants-Appellants.*	No. 74-3222 Notice of Appeal to the Supreme Court of the United States of America

NOTICE IS HEREBY GIVEN that the Public Utility District No. 1 of Douglas County, Washington, a municipal corporation, the Plaintiff-Appellee above-named, hereby appeals to the Supreme Court of the United States of America from the final judgment of this Court vacating the decision of the Federal District Court for the Eastern District of Washington, filed herein on February 25, 1976. Plaintiff-Appellee's Petition for Rehearing was denied on April 23, 1976. This appeal is taken pursuant to 28 U.S.C. Section 1254(1).

DATED this 24th day of May, 1976

HUGHES, JEFFERS & DANIELSON
By GARFIELD R. JEFFERS
Attorneys for Plaintiff-Appellee
Suite C, Professional Centre
Post Office Box 1688
Wenatchee, Washington 98801
Telephone: (509) 662-2146

Exhibit B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, a municipal corporation, *Plaintiff-Appellee,* *vs.* BLAINE M. MADDEN and VIRGINIA C. MADDEN, his wife, *Defendants-Appellants.*	No. 74-3222 Affidavit of Service

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

The undersigned, being first duly sworn, on oath deposes and says: That I am and at all times hereinafter mentioned was a citizen of the United States of America and a resident of the State of Washington, over the age of twenty-one years, and competent to be a witness in this action, and not a party thereto.

That on the 25th day of May, 1976, I served copies of Notice of Appeal to the Supreme Court of the United States of America and Request to Clerk to Certify and Transmit Entire Record on Blaine M. Madden, relator and Defendant-Appellant herein, by then and there delivering copies of said Notice of Appeal to the Supreme Court of the United States of America and and Request to Okanogan County Clerk Jackie Bradley to Certify and Transmit Entire Record to said relator and Defendant-Appellant.

s/ CONEY V. FITZHUGH

SUBSCRIBED AND SWORN TO before me this 3rd day of June, 1976.

s/ IONA McFARLAND
NOTARY PUBLIC in and for the State of Washington, residing at Okanogan